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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 869

FELIX WALLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

WILFRED C. RICE
Attorney for Petitioner
2436 Guardian Building
Detroit, Michigan 48226
965-7962

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INDEX

	Page
Jurisdiction	1
Counter Statement of Facts	2
Reply Argument	2
Argument No. 1	2
Argument No. 2	5-6
Argument No. 3	7
Argument No. 4	7-8
Argument No. 5	9
Argument No. 6	10
Argument No. 7	11
Conclusion	12

CITATIONS

CASES

Barbee v. Warden, Maryland State Penitentiary, 331 F. 2d 842	9
Gordon v. U.S., 344 U.S. 417	11
Hamric v. Bailey, 386 F. 2d 390	9
Peek v. U.S., 321 F. 2d 934	10
People v. Preston, 19 Cal. App. 675; 127 P. 660	11
Seefeldt v. U.S., 183 F. 2d 713	2, 3
Shores v. U.S., 174 F. 2d 838	11
Spradlin v. U.S., 394 F. 2d 816	3, 5
State v. Haas, 188 Md. 63, 51 A. 2d 647	11
U.S. v. Aluminum Co. of America, 232 F. Supp. 644	10
U.S. v. Cumberland, 200 F. 2d 609	7
U.S. v. Lang, 239 F. 2d 676	6
U.S. v. Meek, 388 F. 2d 936	3, 5
U.S. v. Pincourt, 159 F. 2d 917	7
Weaver v. U.S., 374 F. 2d 878	4

MISCELLANEOUS

		Page
Federal Rules of Criminal Procedure —	Rule 52(b)	6, 7
	Rule 16	10
	Rule 26	10
	Rule 57 (b)	10

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JURISDICTION

Counsel for the government argues that our Petition for a Writ of Certiorari was filed November 20, 1969, and is out of time under Rule 22-2 of the Rules of this Court. This statement is incorrect. Our Petition was served on the Clerk's Office November 14, 1969, but was not docketed until November 20, 1969, because the 6th Circuit Court of Appeals had not transmitted the file to the Clerk of this Court; although, requested to do so October 27, 1969. We do not believe that this Court should penalize Petitioner for a tardy transferral of the Lower Court's file by the Court of Appeals.

COUNTER STATEMENT OF FACTS

The record does not indicate that Petitioner *appeared* in Dayton with a 1967 Cadillac for Sheffield, as stated in the opposing Brief. The record stated as follows:

> T. 61 – "A. When I got to the Stratford House I looked for a '67 Cadillac and I saw it parked in a driveway to a parking lot and I assumed it was him and blew my horn and he backed out and followed me to my house."

REPLY ARGUMENT

Appellee says we have presented no issues meritorious of plenary review by this Court. Thank GOD, just saying this doesn't make it so. Appellee's arguments are simply whitewashing attempts, in hope that this Court will arbitrarily make our Petition one of the many casualties. However, we appeal to the conscience of this Court to carefully examine all arguments, pro and con.

1. In Paragraph One (1) of his argument, Counsel for Appellee cites three cases to support his claim that the conviction of Petitioner was supported by the evidence in this case. All three cases are clearly distinguishable and inapplicable in this case:

(a) *Seefeldt* v. *United States,* 183 F. 2d 713 – In this case, Defendant was charged under 18 U.S.C. Sec. 2313, as was Defendant in the instant case. Defendant made contact with one Downing in New Mexico from Colorado to obtain titles for Ten (10) cars by devious means. Downing was employed with the Secretary of State in New Mexico. When Downing told agents about this plot, Defendant hid the car for several days. When questioned by agents, Defendant told them conflicting stories about the car. Defendant testified in Court that he *received* the stolen car from one Wilson. Wilson testified to *deliver-*

ing the car to Defendant. The evidence showed that persons unknown to Defendant and Wilson had brought the car to Wilson and removed Texas license plates from it. Defendant was to sell the car. The Court said, at Page 716, "When Defendant knew he was under surveillance, he cancealed the car and would not let agents know where it was." The Court affirmed the conviction.

(b) *United States* v. *Meek,* 388 Fed. 2d 936 — In this case, Defendant leased car in the name of Meek at Tampa, Florida for Two (2) days and did not return it at the expiration of the lease or secure an extension of time. Defendant took the car to Illinois and Missouri, with one Hanson, the government's star witness. After one week, the sheriff at Tampa, Florida reported the car stolen. Defendant changed the license plates on the car and later told Hanson not to tell anybody about the car, so nobody would get in trouble. Defendant promised Hanson he would pick the car up and get rid of it. Hanson was stopped by officers for a traffic violation and they recognized the car as being one reported stolen. Defendant was charged in a two count indictment under 18 U.S.C. Secs. 2312 and 2313. The Court affirmed the conviction.

(c) *Spradlin* v. *United States,* 394 F. 2d 816 — In this case, the evidence showed that Defendant was in Flagstaff, Arizona when the car in question was stolen from the dealer's lot. Within Two (2) weeks after the theft, Defendant was arrested while operating the car in Nevada. Defendant was charged under 18 U.S.C., Sec. 2312. The Court said the facts supported the jury finding and affirmed the conviction.

We concede that all of the aforestated decisions are correct. However, they are inapplicable as precedent for a decision in this case for the following reasons:

(1) In the *Seefeldt* case, supra, Defendant and Wilson testified in Court that Defendant received the car in New

Mexico and tried to obtain titles for cars by devious means. Also, the evidence clearly showed that when agents questioned Defendant about the car, he concealed its whereabouts from them for several days.

In the instant case, there was no evidence that Walls received and/or concealed the car in question at Dayton, Ohio. Counsel for the government concedes that he could not prove interstate transportation against Walls. (See App. 25a, 26a, 27a) He further concedes that his proofs at trial shows only *possession* by Walls in the Southern District of Ohio. (See T. 174 and 175; App. 27a) Further, government Counsel, in his argument against Defendant's Motion for Judgment of Acquittal, concedes, by abandonment, that he did not prove *concealing* of the car by the Defendant, and argued that he did not have to prove both charges in the indictment, although they were alleged in the conjunctive; citing *Weaver* v. *U.S.*, 374 F. 2d 878 to support his argument. (See T. 173-175) If Counsel for the government agrees that he did not prove *concealing*, then how can the jury find the Defendant guilty as charged? The Court, at least, should have granted the Motion for Judgment of Acquittal on the issue of concealing and sent the case to the jury on the question of receiving.

In this case, government Counsel says he proved unlawful possession by Defendant. He relies on the uncorroborated statement of Sheffield that Walls followed Sheffield from the Stratford House to Sheffield's House. Sheffield did not place Walls behind the wheel as driver of the car. Not one witness put Walls in control of the car in question. Counsel equates possession with *receiving*. This certainly is not enough to convict under 18 U.S.C., Sec. 2313. We join the trial judge when he asked government Counsel: "What was the evidence here with reference to him being in possession of the car? He denied it." (App. 28a)

(2) The *Meek* case, supra, is clearly distinguishable from the instant case. In this case, the District Attorney concedes that he could not prove interstate transportation by Walls and, therefore, did not bring charges under 18 U.S.C., Sec. 2312. However, in *Meek*, the testimony of an accomplice put Meek behind the wheel as operator in several states and changing the license plates to conceal the identity of the car; therefore, he was charged under 18 U.S.C., Sec. 2312 and 2313. Counsel, by abandonment, also, concedes no evidence of concealment against Walls, in this case. (See T. 173-175). Further, in this case, the car in question bore Massachusetts plates, the Massachusetts Registration, which is synonomous to a title in most other states, and other papers, contained the name of Alton Sheffield. Sheffield told Ohio authorities that he (Sheffield) drove the car from Massachusetts to Dayton, Ohio. (T. 78)

(3) The *Spradlin* case, supra, was a charge under 18 U.S.C., Sec. 2312. Defendant was caught operating the stolen car in Nevada, within two weeks after it was stolen in Arizona where he was at the time of theft. In the instant case, Walls was charged under 18 U.S.C., Sec. 2313, which in addition to proof of interstate transporting, there must be proof of "Receiving and Concealing." Therefore, *Spradlin* is inapplicable as a precedent.

Counsel for Appellee says, "Petitioner's receipt of the car which had moved in interstate commerce." This conclusion is unsupported by any evidence presented in the instant case. Defense counsel participated in the trial of this cause and has examined all transcripts several times. Counsel challenges Appellee to point out the evidence upon which he relies.

2. In Paragraph Two, Appellee argues that the Court's failure to define the phrase "Moving as interstate commerce" as a guideline for the jury is not plain error. We

do not believe that a jury of lay people can make a factual finding on such an essential element without proper guidelines from the Court.

Counsel goes on to argue that the following charge of the Court was an inadvertent slip of the tongue:

> T. 233 — "In a criminal prosecution for receiving and concealing a motor vehicle, knowing it to have been stolen is an essential element of the crime and it must be shown by a *preponderance* of the evidence in order to establish the guilt of the accused." (Emphasis added)

Federal Rules of Criminal Procedure 52 (b)

> "Plain Error — Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court."

Any legal scholar will agree, without looking up and citing authorities, that a statement alleging proof in criminal cases need be shown by a "preponderance of evidence" is "Plain Error." Appellee argues that this was an inadvertent error. The record does not support this conclusion. One would have to guess whether the jury understood it this way and applied the theory of "beyond a reasonable doubt."

The following are cases where alleged inadvertent errors were made in the Courts charge to the jury and in each instance, the Appellate Court invoked Rule 52 (b) and remanded the cases for new trial:

> *U.S.* v. *Lang*, 239 F. 2d 676, 677 — The Appellate Court concluded that the trial Courts language in the charge was strong enough to lead one to believe that the Court was saying the cars were stolen. The Court said, "No doubt the Court *inadvertently* used such positive language, but this is not sufficiently clear to support the instruction given. (P. 678) The error

of the trial judge in the substance of the charge was so fundamental that we must order a new trial, despite the fact there were no specific objection taken by Lang's Counsel." (Emphasis added)

Citing: *U.S.* v. *Cumberland,* 200 F. 2d 609, 611; *U.S.* v. *Pincourt,* 159 F. 2d 917, 919; Fed. Rules Crim. Procedure 52 (b) 18 U.S.C.

U.S. v. *Cumberland,* 200 F. 2d 609, 610, Judge Hastie said — "We get no clear meaning from the quoted language and we think it unlikely that the jury did. It is possible that the explicit charge on burden of proof and reasonable doubt may have prevented this confusing statement from doing harm, *but we cannot be confident of that conclusion.*" (Emphasis added)

How the jury understood a mistake in a charge by the Court, should not be a guessing game for Appellate Courts, where the mistake is substantive. The Defendant is entitled to have the jury correctly instructed on the law. The purpose of rule 52 (b) is to offset the infallability of Counsel and safeguard the rights of an accused.

3. As to Appellees argument Number 3, Counsel for Appellant will simply say that the jury was closer to the Court and reporter than defense counsel and Defendant. Since we had no difficulty in hearing the reporter reading arguments and rulings from Counsel table, we assume that the jury likewise had no difficulty so hearing.

We believe our request that arguments and rulings be heard in chambers or after excusing the jury from the Courtroom was reasonable, and the Court's refusal was an abuse of discretion.

Again, what effect this had on the jury's decision should not be a guessing game.

4. In argument Number 4, Counsel for Appellee discusses two of Seven (7) witnesses and contends that Peti-

tioner was not denied favorable evidence upon demand. Counsel argues that the FBI handwriting expert stated that he could not say whether Petitioner prepared Exhibits 5, 6, 7 and 8, because of lack of adequate samples. This is obviously incorrect, because the witness did not testify. We must assume that some samples were submitted for comparison in the first instance. This Court can take judicial notice that Petitioner signed the personal bond forms, acknowledgment of the indictment and property receipt forms. Petitioner was asked if he would do some writing. He refused when the agent declined to explain why. Statements of government Counsel, in this respect, is not evidence.

Statements of government Counsel to the effect that he could not serve a subpoenae on Mrs. White is no proof of this fact. Insignificant witnesses were brought in from Massachusetts, Michigan and Washington, D.C. Yet Counsel claims they could not bring in local witnesses whose names and addresses were known only to them.

Counsel argues that defense counsel could have subpoenaed these witnesses because subpoenaes were there with their addresses recorded. The record does not support this conclusion. Since the trial Court denied our Motion to compel the government to turn over all evidence favorable to the Defendant, we had nothing but names to work with. (see T. 180) Also, we were unfamiliar with the Dayton area. This was one of many reasons why we claim that assistance of "local cousel" was imperative to a fair trial in this case.

Counsel for Appellee does not address himself to the absence of Mrs. Sheffield, Calvin Baines, Mrs. Alma Lawson, the clerk at Everybody's Book Store, the inspection officer at Central Oldsmobile Co. and Mrs. William Gordon, who were all res gestae witnesses. These witnesses

were shown pictures of Defendant by the agent, who had reports of their statements.

The government, admittedly, had a weak case and hand-picked witnesses whose testimony was favorable to their cause. All key witnesses used by the prosecution were relatives and a friend of Alton Sheffield. At one time, Mrs. Sheffield was in the Court building, but was not called as a witness.

See: *Hamric* v. *Bailey,* 386 F. 2d 390 — Writ of Habeas Corpus affirmed where state prosecutor failed to disclose laboratory report until after trial.

Barbee v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 — Habeas Corpus granted where police failed to disclose ballistic and finger print report showing different revolver was used in shooting to exculpate Defendant. Court said this was a violation of Defendant's right to a fair trial.

5. In reply to Appellee's argument Number 5, we cannot dispute Counsel's statement that the Court referred to local rule 4, concerning the question of Counsel at the Arraignment March 29, 1968. However, we unequivocally state that the trial judge said we must have local Counsel to appear in that Court, and further said, his rules required such in *all* cases. (See App. 18a) (Also, Arraignment transcript or Affidavit of Defense Counsel App. 33a) These allegations were not denied in the Court of Appeals, and should be accepted as true. Further, since the Court had to waive this requirement, as alleged in Paragraph 3 of Petitioner's Affidavit, in the Court of Appeals (App. 18a), obviously, such must have been mandatory to necessitate a waiver.

Counsel further argues that there is nothing in the record to show that Petitioner was denied the assistance of local Counsel. Counsel overlooks the undenied Affidavit

of Petitioner filed in the Court of Appeals (App. 18a), which is evidence. Since the trial judge did not say he was invoking rule 4, at the arraignment, we cannot say whether he was acting pursuant to a particular rule, however, we do know that he said *local* Counsel *must* appear in that Court. (Emphasis added) (See App. 33a)

We concede that Defense Counsel did the best he could, under the circumstances, to represent Petitioner during trial, however, Counsel acknowledges that local Counsel was imperative to a fair trial, in this case, due to incidences of patent unfairness and secreting of evidence that might have changed the verdict in this case. Defense Counsel was unfamiliar with the Dayton, Ohio area, and could not do very much to secure the presence of witnesses, intentionally, excluded by the government. The Court had given us a mandate to secure local Counsel and be ready for trial April 17, 1968. We could not secure other local Counsel that would be ready to proceed within a week of trial.

6. Replying to Petitioner's argument Number 6, we do not believe that public policy outweighs an accused's right to a fair trial. A trial is an adversary proceeding, which of course, means nothing if an accused is denied an opportunity to examine evidence presented in Court, to verify its authenticity. The trial Court forced us to take the agents word and leave it at that, concerning proof of an essential element of the crime charged. (See T. 143)

There was no claim that this was privileged matter. The agent classified this information as being "confidential" as does Appellee's Counsel. Confidential business information is not privileged and is subject to discovery and inspection. (See *U.S.* v. *Aluminum Company of America,* 232 Fed. Supp. 644; Fed. Rules of Criminal Procedure 16, 26 and 57b; discovery and inspection allowed on doctrine of "inherent power" in *Peek* v. *U.S.,* 321 F. 2d

934 and *Shores* v. *U.S.*, 174 F. 2d 838; physical examination allowed of a prosecuting witness in a rape case in *People* v. *Preston*, 19 Cal. App. 675, 127 P. 660, 664; 6 Wigmore, Evidence 395; Inspection allowed at trial in *Gordon* v. *U.S.*, 344 U.S. 414, 417, the Court applied rule 26; where prejudice can be shown by refusal to grant discovery and inspection at trial, new trial should be granted. *State* v. *Haas*, 188 Md. 63, 51 A. 2d 647, 649.

We do not believe that an accused must show a favorable result from discovery and inspection, to secure his constitutional right to examine evidence against him at trial, as Appellee's Counsel suggests. This can only be determined by inspection.

Counsel argues that we did not claim that the serial number presented in Court by the agent was erroneous. Obviously, we could not, because we did not know. The Court prevented us from making this determination, erroneously, as a matter of law. Knowing where the serial number came from, certainly would have given us an opportunity to make a physical examination to see whether the agent told the truth. Also, two Dayton Police Officers assisted in obtaining the alleged serial number, but they were not called as witnesses. (See T. 143).

7. In argument 7, Counsel says he sees no possessory interest in Petitioner which permits him to claim an illegal search and seizure. If this statement is true, then an automatic reversal of the conviction is in order, because government Counsel below argued that the basis of the charges and his demand for conviction was predicated upon "unlawful possession" by the Defendant. (See T. 174, 175; App. 25a, 27a) Nevertheless, we believe the cases cited in our original brief clearly support our view, in this respect.

CONCLUSION

For the additional reasons noted, we confirm our prayer that the Writ of Certiorari be granted.

Respectfully submitted,

/s/ WILFRED C. RICE
2436 Guardian Building
Detroit, Michigan 48226
Attorney for Petitioner